Dato' Dr Henry Ooi Kwee Lim v Majlis Perubatan Malaysia

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1(R2)-25–212 OF 2009
ABANG ISKANDAR J
16 DECEMBER 2011

Administrative Law — Disciplinary proceedings — Delay in commencement of — Grave procedural unfairness — Constitutional right under art 5 of the Federal Constitution — Material witness died — Whether seriously prejudiced

The appellant was the deceased's doctor. Before the incident took place on the unfortunate night, the appellant, the deceased and his wife ('the complainant') had enjoyed a round of cards game. Before leaving the deceased's house after the game, the appellant had examined the deceased physically and the deceased had even walked the appellant to the gate outside of his house that night after that. Later on, the complainant had called the appellant in the early hours of the morning and told the latter that the appelant the deceased was suffering from severe pain. The appellant then explained to her the situation and that he would pick the deceased up the next morning and bring him to his clinic. However, on the same morning, the complainant called again to inform the appellant he need not have to pick up the deceased that early as he was already in better condition. Unfortunately, things took for the worse and the deceased died from a clinical condition which was not readily discernable or diagnosable by a specialist. A complaint was lodged to the respondent and the Preliminary Investigation Committee ('PIC') took more than five years to be convened. The disciplinary proceedings, in total, ran for a period of 13 years.

Held, allowing the appeal with costs:

(1) This matter involved a professional judgment call on the part of the doctor, which he would have to exercise when he was required to go to visit his patient's call of 'distress'. The test of that exercise of professional judgment on the part of the doctor was an objective one although the circumstances might be subjective. He must exercise reasonable care objectively when deciding whether to go to the patient's house or not based on the exigency of the situation as he then assessed to be the case (see para 3).

(2) The omission on the part of the appellant to make the house call could not be regarded, under the circumstances as one amounting to an infamous conduct on his part. Not all house calls must necessarily be responded by the doctor having to go to the patient's house. The doctor must evaluate the situation before him. He had to make his professional

judgment call based on the facts in his knowledge at that material time. The appellant had acted professionally. It had not been a situation where the appellant had received a house call in the wee hours of the morning concerning a patient's acute medical condition where he had no previous appreciation of the patient's condition a few hours prior to the call. Professional prudence would have dictated that the doctor in such a situation ought to visit the patient in distress. The peculiar set of circumstances in this case would present a different response and the court was of the view that, any reasonable doctor similarly circumstanced, would have acted in the manner similar to the manner in which the appellant had so acted (see para 7).

(3) The court could not accept the longish time taken to convene the PIC. There had been grave procedural unfairness caused by such delay. This complaint involved the issue of livelihood of the appellant and his constitutional right under art 5 of the Federal Constitution had been adversely affected coupled with the fact that material witness had become 'unavailable' had seriously prejudiced the appellant (see para 2).

[Bahasa Malaysia summary

Perayu merupakan doktor si mati. Sebelum kejadian tersebut berlaku pada malam yang malang itu, perayu, si mati dan isterinya ('si pengadu') sedang menikmati permainan kad. Sebelum meninggal rumah si mati selepas permainan tersebut, perayu telah memeriksa si mati secara fizikal dan si mati boleh berjalan bersama perayu ke pintu pagar di luar rumahnya malam selepas itu. Kemudian, pengadu telah menelefon perayu awal pagi dan memberitahu bahawa si mati telah mengalami kesakitan yang amat sangat. Perayu kemudian menjelaskan kepadanya situasi tersebut dan dia akan mengambil si mati keesokan paginya dan akan membawanya ke klinik. Walau bagaimanapun, pengadu menelefon sekali lagi untuk memberitahu perayu dia tidak perlu mengambil si mati seawal itu memandangkan keadaannya semakin baik. Malang sekali, keadaan menjadi lebih teruk dan si mati meninggal dunia akibat keadaan klinikal yang mana tidak diperhatikan atau didiagnos oleh seorang pakar. Aduan telah dibuat kepada responden dan Jawatankuasa Siasatan Permulaan ('PIC') yang mana mengambil masa lebih daripada lima tahun untuk ditubuhkan. Prosiding disiplin tersebut, secara keseluruhan, berlanjutan untuk tempoh 13 tahun.

Diputuskan, membenarkan rayuan dengan kos:

(1) Perkara ini melibatkan penghakiman profesional yang perlu dilakukan oleh doktor tersebut, yang mana dia patut laksanakan apabila dia diperlukan untuk membuat lawatan apabila menerima panggilan 'distress'. Ujian untuk melaksanakan penghakiman profesional pada pihak doktor adalah sesuatu yang objektif meskipun keadaannya mungkin sangat subjektif. Dia hendaklah melaksanakan jagaan yang

berpatutan secara objektif apabila membuat keputusan sama ada dia harus pergi ke rumah pesakitnya atau tidak berdasarkan keterdesakkan keadaan kes seperti yang dirasakan pada masa itu (lihat perenggan 3).

(2) Peninggalan pada pihak perayu untuk membuat panggilan ke rumah tidak seharusnya dihiraukan, melihatkan keadaan sebagai suatu tindakan yang tidak patut dilakukan pada pihaknya. Bukan semua panggilan ke rumah perlu dibalas dengan doktor tersebut untuk pergi ke rumah pesakit. Doktor tersebut perlu meneliti situasi di hadapannya. Dia perlu membuat keputusan profesional berdasarkan fakta-fakta dalam pengetahuannya pada masa matan tersebut. Perayu telah bertindak dengan profesional. Ia bukanlah suatu situasi di mana perayu telah menerima panggilan untuk melawat pada awal pagi berkenaan dengan keadaan perubatan pesakitnya yang tenat di mana dia tidak memberi penelitian terhadap keadaan pesakit beberapa jam sebelumnya sebelum menerima panggilan tersebut. Kehematan profesional seharusnya membuatkan doktor tersebut di dalam situasi sedemikian untuk melawat pesakit yang berada dalam keadaan kecemasan. Keadaan yang pelik dalam kes ini akan menyebabkan balasan yang berlainan dan mahkamah berpendapat, mana-mana doktor yang waras dalam situasi yang sama, akan bertindak dalam cara yang sama seperti mana yang telah dilakukan oleh perayu (lihat perenggan 7).

(3) Mahkamah tidak dapat menerima jangkamasa yang lama yang diambil untuk menubuhkan PIC. Terdapat ketidakadilan prosedur yang sangat serius yang disebabkan oleh kelewatan tersebut. Aduan ini melibatkan isu kehidupan perayu dan hak perlembagaannya di bawah perkara 5 Perlembagaan Persekutuan yang mana telah mendapat kesan teruk digandingkan dengan fakta bahawa saksi material menjadi 'unavailable' telah memprejudis perayu dengan serius (lihat perenggan 2).]

Notes

For a case on delay in commencement of, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 12.

Cases referred to

Keith Sellar v Lee Kwang Tennakon [1980] 2 MLJ 191, FC (refd)
Wong Kok Chin v Singapore Society of Accountants [1990] 1 MLJ 456, HC (refd)

Legislation referred to

Federal Constitution art 5

MS Dhillon (PS Ranjan & Co) for the applicant.
WA Shashila (Ramrais & Partners) for the respondent.

Abang Iskandar J:

DECISION (IN BRIEF)

[1] Having considered the records of the appeal in the light of the submissions put forth by both learned counsel before this court, it is my considered view that this appeal ought to be, and is hereby allowed with costs of RM25,000.

[2] The longish period (nearly 13 years from the time the preliminary investigation committee was convened to completion) in which this disciplinary proceeding had taken to complete is itself a travesty of justice. The convening of the PIC to look into the complaint took more than five years after the complaint was lodged. Granted that the regulations did not provide for a time-frame within which to begin convene the PIC after a complaint was received by the MMC, the law does provide that it ought to be done within convenient speed. With all due respect, this court cannot accept the longish time taken to convene the PIC as following within the four walls of what is reasonably understood as convenient speed. There has been grave procedural unfairness caused by such delay. This complaint involved the issue of livelihood of the appellant and his constitutional right under art 5 of the Federal Constitution had been adversely affected. Coupled with the fact that material witness had become 'unavailable' had seriously prejudiced the appellant.

[3] Be that as it may, in this case, the house call is not a mandatory thing whereby a doctor must in all cases go to attend to the patient once he was called to do so. I agree with learned counsel for the appellant that this matter involved a professional judgement call on the part of the doctor, which he would have to exercise when he was required to go top visit his patient's call of 'distress'. The testy of that exercise of professional judgment on the part of the doctor is an objective one though the circumstances may be subjective. He must exercise reasonable care objectively when deciding whether to go to the patient's house or not based on the exigency of the situation as he then assessed to be the case. In this case, the appellant was charged with infamous conduct as per the charges that were preferred against him.

[4] In this case, the appellant and the deceased (the husband of the complainant) and a couple of others were playing a game of cards the very night in the house of the deceased, before the incident took place. The deceased was the appellant's patient, professionally. The deceased was the godfather of the appellant. Before leaving the deceased's house after the game, the appellant had examined the deceased physically. The deceased had even walked the appellant to the gate outside of his house that night after that. When the wife of the

deceased had called the appellant later on in the early hours of the morning subsequent to that whereby the wife had told the appellant the deceased was suffering from severe pain, the appellant had explained to her the situation and that he would arrange to have his driver to pick him the next morning and to bring the deceased to his clinic. Later, on the same morning, the wife of the deceased called again to inform the appellant that it was not necessary for the appellant to pick up the deceased that early as he was already in better condition and was then doing some exercise and had even prepared his own morning breakfast. Subsequent to that things turned for the worse and as the saying goes, the rest is history.

[5] Under such circumstances, coupled with the fact that there is evidence from the expert called by the appellant whereby the testimony had been that the cause of death of the deceased had originated from a clinical condition which was not readily discernable or diagnosable by a specialist, let alone by a general practitioner such as the appellant, it would be, to my mind, most unreasonable to find the appellant to be at fault as alleged. In a case of this nature, the burden of proof lies with the accuser MMC and the quantum is high in terms of its degree within the band of on the balance of probabilities. The case of *Keith Sellar v Lee Kwang Tennakon* [1980] 2 MLJ 191 at p 194 is instructive. So is the case of *Wong Kok Chin v Singapore Society of Accountants* [1990] 1 MLJ 456 at p 462.

[6] A perusal of the decision of the MMC had shown that there was insufficient evaluation, if any, of the evidence put forth by the appellant. In particular, the evidence of De Yee, the expert who had testified that the cause of death of the deceased was not easily diagnosable even by a medical specialist. Let alone a general practitioner such as the appellant.

[7] The deceased was a patient of the appellant, they just had a game session in the deceased house. The appellant had examined him before leaving the deceased's house, the deceased had walked them to the gate, the deceased had given advise over the phone to the deceased's wife later in the early hour of the morning later and had told her that he would pick the deceased up on the way to his clinic subsequently the appellant was informed later that the deceased had asked not to be taken to clinic early as planned, as he was feeling better and was making his own breakfast and was exercising. Under the circumstances, the omission on the part of the appellant to make the house call could not be regarded, under the circumstances as one amounting to an infamous conduct on his part. Not all house calls must necessarily be responded by the doctor having to go to the patient's house. The doctor must evaluate the situation before him. He had to make his professional judgement call based on the facts in his knowledge at that material time. In this case, as alluded to above, I would respectfully agree with the contention by learned counsel for the appellant that

his client had acted professionally. It has not been a situation where the appellant had received a house call in the wee hours of the morning concerning a patient's acute medical condition where he had no previous appreciation of the patient's condition a few hours prior to the call. In such a situation, surely professional prudence would have dictated that the doctor in such a situation ought to visit the patient in distress. But the peculiar set of circumstances in this case would present a different response and to my mind, any reasonable doctor similarly circumstanced, would have acted in the manner similar to the manner in which the appellant had so acted.

[8] On that account, among others, this appeal is allowed for procedural unfairness and overall, it cannot be sustained upon scrutiny and is unsafe. Order(s) made against the appellant set aside. The respondent to pay costs to the appellant in the sum of RM25,000.

Appeal allowed with costs.

Reported by Afiq Mohamad Noor